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9 **UNITED STATES DISTRICT COURT**  
 10 **NORTHERN DISTRICT OF CALIFORNIA**

11  
 12 STEPHEN MITCHELL,

Case No. C 07 5112 EDL

13 Plaintiff,

**DR. HAROLD NEMETZ AND OPEN  
 DOOR COMMUNITY HEALTH  
 CENTERS' ANSWER TO  
 COMPLAINT FOR PERSONAL  
 INJURY**

14 v.

**DEMAND FOR JURY TRIAL**

15 DR. HAROLD NEMETZ, OPEN DOOR  
 16 COMMUNITY HEALTH CENTER, U.S.  
 16 DEPARTMENT OF HEALTH &  
 17 HUMAN SERVICES and DOES 1-20  
 17 inclusive,

18 Defendants.

19

20

21

**ANSWER**

22 Defendants DR. HAROLD NEMETZ AND THE OPEN DOOR COMMUNITY  
 23 HEALTH CENTERS ("Defendants"), by and through counsel, hereby answer plaintiff  
 24 STEPHEN MITCHELL'S Complaint for Personal Injury ("Complaint") for themselves  
 25 and no others as follows:

26 1. Answering paragraph 1 of the Complaint, Defendants are without sufficient  
 27 knowledge or information to form a belief as to the truth of the allegations, and on that  
 28 basis deny each and every allegation contained therein.

1           2. Answering paragraph 2 of the Complaint, Defendants are without sufficient  
2 knowledge or information to form a belief as to the truth of the allegations, and on that  
3 basis deny each and every allegation contained therein.

4           3. Answering paragraph 3 of the Complaint, Defendants are without sufficient  
5 knowledge or information to form a belief as to the truth of the allegations, and on that  
6 basis deny each and every allegation contained therein.

7           4. Answering paragraph 4 of the Complaint, Defendants are without sufficient  
8 knowledge or information to form a belief as to the truth of the allegations, and on that  
9 basis deny each and every allegation contained therein.

10          5. Answering paragraph 5 of the Complaint, Defendants admit that the Open  
11 Door Community Health Centers at all times mentioned in the Complaint operated the  
12 Del Norte Community Health Center in Del Norte County, State of California and that the  
13 Open Door Community Health Centers at all times mentioned in the Complaint were  
14 funded in part by the United States Department of Health and Human Services.

15          6. Answering paragraph 6 of the Complaint, Defendants admit that at all times  
16 mentioned in the Complaint that Dr. Harold Nemetz was a licensed dentist in the State of  
17 California and an employee of the Del Norte Community Health Center located in Del  
18 Norte County, California.

19          7. Answering paragraph 7, sentence one, Defendants admit that on October  
20 18, 2002, Dr. Nemetz, who is employed by the Del Norte Community Health Center,  
21 provided dental treatment to plaintiff Stephen Mitchell who had previous dental services  
22 provided by the Del Norte Community Health Center on September 5, 2001 and that on  
23 September 5, 2001 tooth #15 was extracted. Answering paragraph 7, sentence two,  
24 Defendants admit that the medical records indicate that on October 18, 2002 Dr. Nemetz  
25 diagnosed plaintiff Stephen Mitchell's tooth # 2 with a vertical fracture. Answering  
26 paragraph 7, sentence three, Defendants admit that on October 18, 2002, plaintiff Stephen  
27 Mitchell signed a consent form for "ext #2." Answering paragraph 7, sentences four,  
28 five, six and seven, Defendants are without sufficient knowledge or information to form a

1 belief as to the truth of the allegations, and on that basis deny each and every allegation  
2 contained therein.

3 8. Answering paragraph 8, Defendants deny each and every allegation.

4 9. Answering paragraph 9, Defendants deny each and every allegation.

5 10. Answering paragraph 10, Defendants are without sufficient knowledge or  
6 information to form a belief as to the truth of the allegations, and on that basis deny each  
7 and every allegation contained therein.

8 11. Answering paragraph 11, Defendants admit that the Dental Board of  
9 California sent a letter dated June 27, 2006 to Dr. Harold Nemetz containing the language  
10 the language in quotes in the Complaint paragraph 11, except that "09-05001" in sentence  
11 four of the quote actually appears as "9-5-01" and that sentence seven of the quote  
12 actually reads "You diagnosed tooth #2 with a vertical fracture."

13 12. Answering paragraph 12, Defendants admit that an Exhibit "A" is attached  
14 to the Complaint. Defendants are without sufficient knowledge or information to form a  
15 belief as to the truth of the remaining allegations of paragraph 12, and on that basis deny  
16 each and every other allegation contained therein.

17 13. Answering paragraph 13, Defendants admit that an Exhibit "B" is attached  
18 to the Complaint. Defendants are without sufficient knowledge or information to form a  
19 belief as to the truth of the remaining allegations of paragraph 13, and on that basis deny  
20 each and every other allegation contained therein.

21 14. Answering paragraph 14, Defendants deny each and every allegation.

22 15. Answering paragraph 15, Defendants deny each and every allegation.

23 16. Answering paragraph 16, Defendants admit that plaintiff contends in the  
24 Complaint that the accrual date in the instant case is June 27, 2006 under 28 USCS  
25 §2401(b) but Defendants deny that the accrual date in the instant case is June 27, 2006  
26 under 28 USCS §2401(b).

27 17. Answering paragraph 17, Defendants are without sufficient knowledge or  
28 information to form a belief as to the truth of the allegations, and on that basis deny each

1 and every allegation contained therein.

2 **AFFIRMATIVE DEFENSES**

3 **FIRST AFFIRMATIVE DEFENSE**

4 1. AS A FIRST, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
5 to the Complaint, Defendants allege that the complaint fails to state a cause of action.

6 **SECOND AFFIRMATIVE DEFENSE**

7 2. AS A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE  
8 DEFENSE to the Complaint, Defendants allege that the Complaint does not state facts  
9 sufficient to constitute a cause of action in that the alleged cause of action is barred by the  
10 statute of limitations under California law. CCP §§340, 340.5 and 364.

11 **THIRD AFFIRMATIVE DEFENSE**

12 3. AS A THIRD, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
13 to the Complaint, Defendants allege that the Complaint does not state facts sufficient to  
14 constitute a cause of action in that the alleged cause of action is barred by the applicable  
15 statute of limitations under the Federal law or the Federal Tort Claims Act.

16 **FOURTH AFFIRMATIVE DEFENSE**

17 4. AS A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE  
18 DEFENSE, to the Complaint, Defendants allege that the Complaint does not state facts  
19 sufficient to state a claim that further the cause of action is barred by plaintiff's failure to  
20 follow all applicable claim requirements of the Federal Tort Claims Act.

21 **FIFTH AFFIRMATIVE DEFENSE**

22 5. AS A FIFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
23 to the Complaint, Defendants allege that if it should be found that there was damage to  
24 plaintiff resulting from any negligent act in connection with the subject matter of the  
25 Complaint, that plaintiff's damages, if any, were caused by the negligent acts of the  
26 plaintiff and individual(s), persons, firms, corporations or entities, other than the  
27 Defendants, that comparatively reduces the percentage of any liability on the part of these  
28 Defendants, if it should be found that these answering defendants are negligent or liable,

1 as alleged in the Complaint, which liability these Defendants have denied and expressly  
2 do deny.

3 SIXTH AFFIRMATIVE DEFENSE

4 6. AS A SIXTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
5 to the Complaint, the Defendants allege that at all times relevant to the Complaint, and on  
6 or before the dates of the incident alleged in the Complaint, each and every risk or danger  
7 proximately causing or contributing to the alleged occurrence or damages complained of,  
8 if there actually were any, was voluntarily and/or knowingly assumed by the plaintiff.

9 SEVENTH AFFIRMATIVE DEFENSE

10 7. AS A SEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
11 DEFENSE to the Complaint, in the event the Defendants are found to be liable, which is  
12 expressly herein denied, the liability of the Defendants is limited by reason of CC  
13 §1431.2.

14 EIGHTH AFFIRMATIVE DEFENSE

15 8. AS AN EIGHTH, SEPARATE AND DISTINCT AFFIRMATIVE  
16 DEFENSE to the Complaint, Defendants allege that in the event the Defendants are found  
17 liable, which Defendants deny and state merely for the purpose of this affirmative  
18 defense, Defendants may elect to introduce evidence of any amount paid or payable, if  
19 any, as a benefit to plaintiff and claim credit pursuant to CC §3333.1.

20 NINTH AFFIRMATIVE DEFENSE

21 9. AS A NINTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
22 to the Complaint, Defendants allege that in the event the Defendants are found to be  
23 liable, which Defendants deny and state merely for the purpose of this affirmative  
24 defense, the damages for non-economic losses shall not exceed the amount specified in  
25 CC §3333.2.

26 TENTH AFFIRMATIVE DEFENSE

27 10. AS A TENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE  
28 to the Complaint, Defendants allege that in the event Defendants are found liable, which

1 Defendants deny and state merely for the purposes of this affirmative defense, Defendants  
2 may elect to have future damages, if in excess of the amount specified in CCP §667.7,  
3 paid in full or in part as specified in CCP §667.7.

## ELEVENTH AFFIRMATIVE DEFENSE

5 11. AS AN ELEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE  
6 DEFENSE to the Complaint, Defendants allege that plaintiff has and continues to fail and  
7 refuses to exercise a reasonable effort to mitigate any damages.

## TWELFTH AFFIRMATIVE DEFENSE

9           12. AS A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE,  
10 Defendants allege that plaintiff's action herein is barred by the doctrine of laches,  
11 estoppel, and waiver.

## THIRTEENTH AFFIRMATIVE DEFENSE

13       13. AS A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE to  
14 the Complaint, Defendants allege that they were acting within the scope of their  
15 employment at a federally funded health care center, or as a federally funded health care  
16 center at all times relevant to plaintiff's claims. Pursuant to the Federally Supported  
17 Health Centers Act, 42 U.S.C. §233(g)-(n) all of the Defendants are covered under the  
18 Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§1346(b), 2401(b), 2671-80. The  
19 Secretary of Health and Human Services has deemed Open Door Community Health  
20 Center eligible for FTCA coverage pursuant to the Federally Supported Health Centers  
21 Assistance Act, 42 U.S.C §233(g)-(n). Pursuant to that authority, and upon proper service  
22 to the United States Government, the United States Government will be substituted for  
23 the Defendants in this matter and the matter will proceed as an action solely against the  
24 United States of America pursuant to 28 U.S.C. §1346(b) subject to the limitations and  
25 exceptions applicable to those actions. 28 U.S.C. §2679(d)(4). Therefore, Defendants  
26 specifically reserve all affirmative defenses that can be raised by the United States  
27 Government.

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#### FOURTEENTH AFFIRMATIVE DEFENSE

\_\_\_\_ 14. AS A FOURTEENTH, SEPARATE AFFIRMATIVE DEFENSE, Plaintiff fails to state a claim upon which relief may be granted.

**FIFTEENTH AFFIRMATIVE DEFENSE**

15. AS FIFTEENTH, SEPARATE AFFIRMATIVE DEFENSE, Defendants did not breach a recognizable duty owed to plaintiff.

## SIXTEENTH AFFIRMATIVE DEFENSE

16. AS A SIXTEENTH, SEPARATE AFFIRMATIVE DEFENSE, in the event that Defendants are found negligent, which negligence Defendants deny, such negligence is not the cause in fact or proximate cause of alleged damages suffered by plaintiff.

## SEVENTEENTH AFFIRMATIVE DEFENSE

17. AS A SEVENTEENTH, SEPARATE AFFIRMATIVE DEFENSE, the injuries and/or damages alleged in the Complaint were not proximately caused by a negligence or wrongful act or omission of an employee or a contractor of the United States, acting within the scope of his or her employment or within the scope of the contract.

## EIGHTEENTH AFFIRMATIVE DEFENSE

18. AS AN EIGHTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, attorneys fees are taken out of the judgment or settlement at a rate determined and governed by statute. 28 U.S.C. §2678.

## NINETEENTH AFFIRMATIVE DEFENSE

19. AS A NINETEENTH, SEPARATE AND AFFIRMATIVE DEFENSE,  
Defendants are not liable for interest prior to judgment or punitive damages. 28 U.S.C.  
§2674.

## TWENTIETH AFFIRMATIVE DEFENSE

20. AS A TWENTIETH, SEPARATE AND AFFIRMATIVE DEFENSE, any recovery by plaintiff is subject to the availability of appropriated funds. 42 U.S.C. §233(k).

## TWENTY-FIRST AFFIRMATIVE DEFENSE

2        21.     AS A TWENTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE,  
3 plaintiff's right to sue the United States is limited to the extent of waiver of sovereign  
4 immunity and the administrative requirements set forth in the Federal Tort Claims Act, 28  
5 U.S.C. §2671 *et seq.*

## TWENTY-SECOND AFFIRMATIVE DEFENSE

7 22. AS A TWENTY-SECOND, SEPARATE AND AFFIRMATIVE  
8 DEFENSE, plaintiff is not entitled to a trial by jury under 28 U.S.C. §2402.

### TWENTY-THIRD AFFIRMATIVE DEFENSE

10           23. AS A TWENTY-THIRD, SEPARATE AND AFFIRMATIVE DEFENSE,  
11 plaintiff is limited to the damages amount set forth in the administrative claim. 28 U.S.C.  
12 §2675(b).

TWENTY-FOURTH AFFIRMATIVE DEFENSE

14 24. AS A TWENTY-FOURTH, SEPARATE AND AFFIRMATIVE  
15 DEFENSE, plaintiff's contributory negligence bars recovery.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

17       25. AS A TWENTY-FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE,  
18 the negligence of third parties reduces or bars plaintiff's recovery.

## TWENTY-SIXTH AFFIRMATIVE DEFENSE

20        26. AS A TWENTY-SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE,  
21 Defendants acted at all times within the applicable standard of care.

## TWENTY-SEVENTH AFFIRMATIVE DEFENSE

23       27. AS A TWENTY-SEVENTH, SEPARATE AND AFFIRMATIVE  
24 DEFENSE, third party conduct was a superceding, intervening cause of any damages  
25 claimed by plaintiff.

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TWENTY-EIGHTH AFFIRMATIVE DEFENSE

2        28.     AS A TWENTY-EIGHTH, SEPARATE AND AFFIRMATIVE  
3 DEFENSE, some or all of plaintiff's claims are barred by the applicable statute of  
4 limitations.

## TWENTY-NINTH AFFIRMATIVE DEFENSE

6 29. AS A TWENTY-NINTH, SEPARATE AND AFFIRMATIVE DEFENSE,  
7 some or all of plaintiff's claims are so speculative in nature that they should be dismissed.

8 Defendants assert that they have, or may have, additional affirmative defenses  
9 which are not known to Defendants at this time, but which may be ascertained through  
10 discovery. Defendant specifically preserves those and other affirmative defense as they  
11 are ascertained through discovery.

12       **WHEREFORE**, Defendants pray that plaintiff's Complaint be dismissed, that  
13 Defendants be awarded costs of suit incurred herein, and for such other and further relief  
14 as the court deems just and proper.

15 Dated: December 17, 2007 JANSSEN, MALLOY, NEEDHAM, MORRISON,  
REINHOLTSEN & CROWLEY, LLP

By: \_\_\_\_\_ /s/ \_\_\_\_\_  
Frances K. Greenleaf  
Michael Morrison  
Attorneys for Dr. Harold Nemetz and  
Open Door Community Health Center